Supreme Court, U. S.
FILED
OCT 18 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-652

DAVID B. PEAT, *Petitioner*,

v.

NATIONAL TRANSPORTATION SAFETY BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the District of Columbia

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The petitioner, David B. Peat, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on May 22, 1978.

OPINIONS BELOW

The Per Curiam order of the Court of Appeals summarily affirming the opinion and order of the National Transportation Safety Board on review, and the opinion and sanction order of said Board appear in the Appendix.

STATUTORY PROVISIONS INVOLVED

1. FIFTH Amendment to the U.S. Constitution:

   No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

2. Federal Air Regulation 91.9; 14 C.F.R. 91.9:

   No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

JURISDICTION

The order of the Court of Appeals was entered on May 22, 1978 and leave to file this petition on and until October 18, 1978 was duly granted by Mr. Justice Brennan. The Court's jurisdiction is invoked under 49 U.S.C. § 1486(f) per 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. Whether a general duty clause promulgated by a Federal agency meets Due Process requirements where it is so broadly applied and construed to include conduct not reasonably within the plain meaning of its language; specifically, can the *nature of the communications* between an airline captain and an air controller, constitute careless or reckless *operation* of an aircraft?

2. Whether the statutory substantial evidence standard of judicial review is met where the record is devoid of evidence that the *nature of radio communications* constitute *operation* of an aircraft within the general duty clause of F.A.R. 91.9 prohibiting careless or reckless operation of an aircraft.

STATEMENT OF THE CASE

The Petitioner was the airline Captain of a commercial B-727 jet descending on a clearance into the Chicago area for an approach to the O'Hare airport when the Air Traffic Controller issued a clearance for the aircraft to slow down. That clearance was rejected by the Captain, and what then ensued was a conversation between the Captain and the air controller during which time the Captain rejected and questioned the propriety of several other clearances which would have taken him out of sequence for the direct flow of traffic into O'Hare. Upon receiving a mutually satisfactory clearance, the flight continued and terminated uneventfully. Then the FAA Administrator duly began proceedings and suspended the Captain's airman certificate for two months, upon the charge of a violation F.A.R. 91.9 which reads:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

The result was a determination by the National Transportation Safety Board affirming the suspension, but holding that it was not the Captain's rejection of the clearance to reduce speed but rather the nature of the communications thereafter which gave rise to the violation of F.A.R. 91.9. The Board went on further to explain that by engaging the air controller in a steady conversation for three minutes, the Captain monopolized the radio frequency and thereby precluded the controller from devoting adequate attention to other aircraft, thereby endangering "the life or property of another."

On appeal *pro se,* the Captain argued, by brief, that the Board's determination violated his right to FIFTH Amend-

ment due process because the conduct prohibited by F.A.R. 91.9 does not include the nature of radio communications. The Circuit Court denied the Captain's motion for oral argument and granted the Board's motion for summary affirmance of its order.

REASONS RELIED ON FOR ISSUANCE OF THE WRIT

1. The general duty clause versus Due Process is an important Federal question which should be settled by the Court.

The major reason why the Court should issue the writ lies in the relationship between the so-called general duty clause (the most popular vehicle of enforcement of Federal agency rules) and the requirements of Due Process. Here, the question looms, where the petitioner Captain has complained all along, that the conduct prohibited by the plain language of the catchall provision of F.A.R. 91.9 cannot reasonably include the nature of his radio communications. On the other hand, the FAA Administrator, the administrative law judge, the NTSB and the Circuit Court have assumed that the Captain's radio communications are so included. Only the Court can set the matter straight and draw the Due Process limit upon the general duty clause in this case.

The conflict between Due Process and the general duty clause is a modern day legal phenomenon which requires the Court's attention not just to correct the injustice here, but it is important, because without the restraint of judicial guidelines from the Court, overzealous administrators can stretch the general duty clause, as in this case, to virtually

eliminate the establishment and notice of standards required by Due Process. And, given the large and growing number of Federal administrators vested with with the police power to economically sanction citizens,[1] maintenance of the necessary Constitutional balance between Due Process and the general duly clause requires immediate attention from the Court.

In his treatise on Administrative law, Professor Davis predicted the eventual modern lines of battle between the Courts and the administrators when he said:

> The key is very simple: *Courts may require administrators to articulate the standards that guide their discretion.* The development of that idea may seem a hundred years from now to be one of the most important turns American law has ever taken, because it is a major way of improving the quality of justice by controlling discretionary power. Davis, Administrative Law of the Seventies (1976) at p. 26.

Judge Burger made a parallel observation in *Gonzalez v. Freeman,* 334 F.2d 570 (CA DC 1964) noting that considerations of basic fairness require notice of established standards by an agency.

The battle is manifested in the conflict between Due Process and the general duty clause here as well as other agencies. See generally, Note: *The General Duty Clause of [OSHA]*, 86 H.L.R. 988 (1973) and *ITO Corp. of New England v. OSHRC,* 540 F.2d 543 (1st Cir. 1976).

In order to satisfy the principle of established and articulated standards by administrators, the Court should take

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[1]E.g. F.C.C., O.S. & H.A., F.E.A., E.P.A., E.E.O.C., S.E.C., I.C.C. and F.P.C.

this opportunity to review the broad scope of the general duty clause as it rubs against and overshadows the requirements of Due Process.

Correlated to this conflict with Due Process is the role of the concept of judicial deference to administrative expertise where a violation of a general duty clause is alleged. All too often, as in this case, a reviewing court may, in deference to the agency, fail to adequately scrutinize the alleged conduct as being that type of conduct prohibited by the general duty. Conversely, an agency may use judicial deference to prosecute violations under a general duty clause for conduct outside of its scope and thereby avoid the sometime tedious and difficult but constitutionally required task of promulgating specific standards. The Court should deal with the main question in this respect too.

2. There is no evidence to sustain the order of the Circuit Court which conflicts with decisions of the Court.

The Circuit Court of Appeal has the duty to review the NTSB determination on a standard of substantial evidence. 49 U.S.C. §1486. Here, the record is devoid of any evidence which tends to prove the Board's determination that the nature of radio communications is "operation of an aircraft" within the meaning of F.A.R. 91.9. Indeed, the issue has been assumed even where the petitioner has raised his right to Due Process. This is in conflict with the principles laid down by the Court in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), and a host of derivative opinions.

The Court should review this case not only to correct doubtful decision below, but to re-enforce and re-emphasize the due process mandate of the statement etched in stone over the Courthouse—*Equal Justice Under Law.*

October 12, 1978.

Respectfully submitted,
WILLIAM E. WEST, JR.
Attorney for Petitioner.

(Appendix Follows)

APPENDIX

Appendix

United States Court of Appeals
For the District of Columbia Circuit

September Term, 1977

No. 77-1835

D. B. Peat,
Petitioner,

v.

National Transportation Safety Board,
Respondent.

[Filed May 22, 1978]

ORDER

BEFORE: Wright, Chief Judge; McGowan, Circuit Judge

On consideration of respondent's motion for summary affirmance, and of petitioner's motion for oral argument, it is

ORDERED by the Court that petitioner's motion for oral argument is denied, and, it is

FURTHER ORDERED by the Court that the order of the National Transportation Safety Board under review herein be, and the same hereby is, affirmed.

The Clerk is directed to transmit a certified copy of this order to the National Transportation Safety Board as promptly as the business of his office permits.

Per Curiam

SERVED: January 27, 1977
NTSB Order No. EA-954

United States of America
National Transportation Safety Board
Washington, D.C.

Adopted by the National Transportation Safety Board
at its office in Washington, D.C.
on the 24th day of January 1977.

Docket SE-3247

John L. McLucas, Administrator, Federal Aviation Administration,
Complainant,

v.

D. B. Peat,
Respondent.

OPINION AND ORDER

Both respondent and the Administrator have appealed from the initial decision of Administrative Law Judge William E. Fowler, Jr., issued orally at the conclusion of the hearing held in this proceeding on September 16 and 17, 1976.[1] The law judge found therein that, on January 12, 1975, respondent operated, as pilot-in-command, United Air Lines (UAL) Flight 689, B-727-100, N7083U, on a regularly scheduled passenger-carrying flight from Fort Wayne, Indiana, to Chicago O'Hare International Airport, Illinois; that respondent was requested by air traffic con-

[1]An excerpt from the hearing transcript containing the initial decision is attached.

trol (ATC) to reduce speed from 200 knots to 180 knots, a request with which respondent did not comply; that thereafter, as an alternative to reducing speed, respondent was cleared to proceed to the Chicago Heights VOR to a holding pattern, a clearance which respondent refused; and that respondent thereafter entered into a protracted discussion over the radio concerning the authority of ATC, which discussion, along with respondent's refusal to cooperate with ATC, diverted the controller unnecessarily from other duties. The law judge further found that, by virtue of the foregoing, respondent operated the aircraft in a careless manner so as to endanger the life and property of others, in violation of section 91.9 of the Federal Aviation Regulations[2] (FAR). The law judge thereupon modified the Administrator's order to reduce the period of suspension of respondent's airline transport pilot certificate from 60 days to 20 days.

In support of his appeal, respondent has filed a brief wherein he argues that neither the facts of this case nor Board precedent support the finding of a violation of section 91.9; but rather that respondent is being penalized for the manner in which he exercised his right to not accept a clearance or to request an alternate clearance.

The Administrator has appealed from the reduction in sanction, urging that the 60-day suspension be reinstated in view of (a) the law judge's failure to set forth clear and compelling reasons for the reduction, (b) Board prece-

[2]Section 91.9 reads as follows:
"§ 91.9 *Careless or reckless operation.*
No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

dent establishing the appropriateness of a 60-day suspension, and (c) the potential for disaster caused by the intentional acts of respondent.

Each of the parties has also filed a reply brief opposing the appeal of the other party.

Upon consideration of the briefs of the parties, and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order suspending respondent's certificate for 60 days. Except as modified herein with respect to sanction, we adopt as our own the findings of the law judge.

The record reflects that UAL Flight 689, as part of the process of entering the sequential flow of traffic into the Chicago area from the southeast, had been cleared to descend to 10,000 feet and assigned a heading of 300°. As the line of traffic was vectored toward the localizer, the aircraft were being slowed to 180 knots in order to achieve the proper spacing and sequencing for the approach. At a point when the Flight 689 was descending through an altitude of approximately 11,000 feet at an approximate speed of 355 knots, the following conversation ensued between the flight (UA 689) and the controller working the sector southeast of Chicago (B53R):[3]

0215:15 B53R: (GMT)	United six eight nine reduce now to a hundred eighty knots, left to a heading of two six zero.
0215:25 UA689:	Two sixty one eighty on the heading (pause) speed.

[3]Exhibit A-1, pages 7 to 10.

UA689:	(another voice) United six eighty nine ah two hundreds our minimum right now.
0215:30 B53R:	United six eighty nine ah you'll either have to do a hundred and eighty sir or I'll have to clear you to Chicago Heights (CGT) There's aircraft five in front of you—they will be five behind you at a hundred eighty knots for the localizer.
0215:40 UA689:	I said our minimums two hundred.
0215:45 B53R:	Roger turn ah left (unreadable word) and proceed direct Chicago Heights hold southeast of Chicago Heights on Victor seven, make right turns ten D-M-E legs and I'll have an approach clearance for you shortly.
0216:00 UA689:	Ah cleared direct-to-Chicago Heights for six eighty nine and say the rest.
0216:05 B53R:	I'll have it for you shortly sir—do you have ah any ah special problems.
0216:10 UA 689:	United six eighty nine, say the rest ah of the clearance we got direct Chicago Heights only.
0216:15 B53R:	Okay direct Chicago Heights hold southeast of Chicago Heights on Victor seven, make right turns ten D-M-E legs and I'll have an a expected approach clearance time of zero two three six.
0216:25 UA689:	I won't accept that ah United ah six eighty nine.
0216:35 B53R:	United six eighty nine ah okay sir ah turn left now ah one eight zero, operate at two hundred knots.

0216:40 UA689: Yes sir that is because I can't fit you in that ah is that in sequency with the traffic?

0216:50 B53R: Yes sir that is because I can't fit you in cause you won't comply with the speed.

UA689: Oh United six eighty nine ah I wanna know what F-A-R gives you that prerogative.

0217:00 B53R: You are not going to ah do what sir?

0217:00 UA689: I just wanted you to tell me what ah section of of the ah seventy one ten handbook or the F-A-R you can do that ah you can take me out of sequence because if I ah ah choose not to cooperate below two hundred knots but because I ah because of configuration.

0217:15 B53R: Well sir ah I'll get it out in a minute, I don't have it open at the present time ah what I am trying to do is run the most expeditious, safe flow of traffic feasible, and you are not complying, and so that's the reason I have to pull you out of sequence.

0217:30 UA689: Okay I'll accept a vector but ah I want either that or I wanta ah to continue in sequence (unreadable) vector means in the sequence with the rest of the traffic.

0217:40 B53R: Okay United six five nine when you get on the ground give me a call. Turn left to a heading of two five zero. I will vector you, I will give you special handling and we'll talk this out when you get on the ground.

0217:50 UA689: Negative! United Six eight nine give me a clearance in sequence or else tell me what ah ah paragraph that gives you that prerogative.

0217:55 B53R: United six five nine left to a heading of two five zero can you do that.

? : Ah your (unreadable) this is (pause) six eight-nine is askin for the information.

0218:05 B53R: United six eighty nine my apology turn left to a heading now of two four zero can you comply?

0218:15 UA689: Left! To two four zero (pause) that's affirmative United six eighty nine left to two four zero.

At 0219:15 (a minute after the end of the above conversation), the controller, upon recognizing that UAL 689 was turning back into the inbound flow of traffic, requested the flight to "bring it back to the right to a heading toward Chicago Heights." The flight complied and thereafter (at 0224:15), the controller directed UAL 689 to intercept the localizer and fly inbound.[4]

The B53R controlled testified that he instructed UAL 689 to reduce its speed to 180 knots since there were a number of other aircraft in front of that flight operating at that speed and that if UAL 689 did not also reduce to 180 knots it would overtake the other planes and the 5 mile minimum separation would not be maintained. Respondent testified that his principal reason for refusing the request was the increased fuel flow necessary to operate 180 knots

[4]The only other communications between UAL 689 and the B53R controller concerned the telephone number of the Aurora Center, which respondent requested so that he could discuss the matter with the center after landing.

(as compared with 200 knots) and that the change in configuration necessary to operate at the lower speed was a secondary factor.[5]

In our judgment, the speed reduction requested by the controller was eminently reasonable under the circumstances in that it was designed to assure the proper spacing and sequencing of inbound aircraft as they were being vectored in a line toward the approach. It is noteworthy that UAL 689 was the only flight among a substantial number which refused to comply with the 180 knot speed limitation.[6] The refusal of UAL 689 to reduce to that speed, on the other hand, was not reasonable. Although there was a conflict between the parties regarding the amount of fuel saved by operating at 200 knots,[7] it is apparent to this Board that any factor of fuel economy is clearly outweighed by the factor of assuring a safe and orderly flow of traffic.

Respondent's refusal to reduce to 180 knots, however, is not at the heart of the violation charged herein.[8] Rather, it is the nature of the communications that took place there-

[5]The aircraft can be operated in a clean configuration at 200 knots, but in order to operate at 180 knots, 2° of flaps must be lowered.

[6]Another flight (UAL 357), which was trailing UAL 689, was allowed to remain at 200 knots for a period of time but only because that flight, unlike UAL 689, had some distance to go before it closed to the minimal separation from the flight immediately in front of it.

[7]The Administrator's expert witness testified that the savings would be in the order of 300 pounds of fuel per hour, whereas the first officer on UAL 689 estimated a figure of 3,000 pounds per hour. Since the flight was only about 10 minutes from the glide slope when the speed reduction was requested, the total savings in fuel would have been between 50 and 500 pounds.

[8]As the Administrator concedes, and as the controller's handbook provides (See Exhibit A-3), a flight in the position of UAL 689 at the time the speed reduction request was made has the prerogative of refusing a reduction in speed to 180 knots.

after which give rise to the violation of section 91.9. For a period of 3 minutes (0215:15 to 0218:15), respondent engaged the B53R controller in a steady conversation which had the effect of monopolizing the frequency and thus precluding the controller from giving an appropriate degree of attention to the other aircraft under his control. During that conversation, respondent adamantly refused to accept any clearance or instruction which would take UAL 689 out of its sequence in the inbound line of traffic and persistently demanded that the controller cite the provision in the controller's handbook which authorized the controller to act as he did.[9] This type of conversation, which was initiated and forced upon the controller by respondent, is obviously one which should not be conducted on the center frequency, but rather one that should have awaited a point in time after the landing when neither of the participants was busily engaged in other, more important duties.[10]

Respondent maintains that, notwithstanding his manner of refusing clearances or requesting alternative clearances, a violation of section 91.9 was not established inasmuch as endangerment, even in the potential sense, has not been shown. As respondent points out, UAL 689 at no time came within the minimal separation from another aircraft of 5 miles laterally or 1,000 feet vertically. Furthermore, it does not appear from the record that the controller's preoccupation with handling UAL 689 resulted in any significant

[9]Respondent apparently refused to understand, or to accept, the controller's premise, which was reasonable in our view, that maintenance of a speed of 200 knots was incompatible with respondent's insistence to remain in sequence.

[10]The controller suggested at one point that "I will give you special handling and we'll talk this out on the ground", to which respondent replied "Negative!" Exhibit A-1, pp. 9-10.

safety problems with respect to his control of other aircraft. Nevertheless, as the Board has consistently held, the absence of actual endangerment does not preclude a finding of a section 91.9 violation. The concept of the nature of the endangerment necessary to support a violation of section 91.9 has been fully explored by the U.S. Court of Appeals for the District of Columbia Circuit, which held as follows:[11]

> "What is more important is that, in the judgment of the Board, potential danger was unnecessarily presented, and this is sufficient to support a finding that the regulation was violated. E.g., Administrator v. Jarrendt, 32 C.A.B. 1377 (1960); Lee Rogers, 31 C.A.B. 1135 (1960). Proof of actual danger is unnecessary, for the regulation prohibits any careless or reckless practice in which danger is inherent.[10] That danger was inherent in the pilot's conduct—that danger might have developed in the ordinary course of events—is a matter for the Board's determination in the reasonable exercise of its expert judgment. United States v. Great Northern Ry. Co., 337 F.2d 243, 247 (8th Cir. 1964); Nadiak v. C.A.B., 305 F.2d 588, 593 (5th Cir. 1962). We see no reason to disturb the Board's finding in this respect. Nor will we disturb the Board's determination of the degree of danger necessary to establish a violation of regulation. We think that determination was reasonable and consistent with the wording of the regulation. See Udall v. Tallman, 380 U.S. 1, 16-17 (1965).

[10]The wording of the regulation does not support a requirement of actual danger. Instead it prohibits the '[operation of] an aircraft in a careless . . . manner so as to endanger the life or property.' 14 C.F.R. § 121.535(f) (1971) (emphasis added)."

[11]*Haines* v. *D.O.T.*, 449 F.2d 1073 (C.A.D.C. 1971).

> The policy of the regulation would be subverted if its enforcement turned on a post facto view of the degree of danger presented. The regulation is intended to prevent inherently dangerous practices, and it is no defense that by happenstance and in retrospect no actual danger appears. See Administrator v. Jarrendt, 32 C.A.B. 1377, 1396 (1960).

In our judgment, the potential danger caused by respondent's unwarranted and protracted discussion with the controller clearly falls within the concept of endangerment described by the court in the above-quoted decision. By distracting the controller for 3 minutes, during a period when the controller was sequencing a number of aircraft into the approach position, respondent produced an inherently dangerous and totally unnecessary situation in which a carefully constructed and tightly sequenced flow of traffic was left largely unattended.[12] The fact that respondent's inherently dangerous practice, in happenstance and in retrospect, was not converted to actual endangerment is not controlling. Consequently, it is the Board's conclusion that a violation of section 91.9 has been established by a preponderance of the evidence.[13]

[12]Some of the potential ramifications of such a situation were a) a delay in transferring control of other aircraft to O'Hare Approach Control, b) a delay in turning other aircraft to align them with the localizer and prevent them from continuing into an area through other aircraft were departing from O'Hare, and c) an inability to provide additional services, such as traffic advisories, to aircraft under the B53R controller's control.

[13]The cases cited by respondent, in which the Board found no violation of section 91.9, are all distinguishable. In *Administrator v. Holderman*, Order EA-489, July 26, 1973, the Board found that the respondent's inadvertent raising of the landing gear, when the plane was moving at a speed of 15 to 20 m.p.h., caused no actual or potential hazard or endangerment. In *Administrator* v. *Eger*, Order EA-580, May 8, 1974, the Board found that respondent's landing on

Turning to the question of sanction, the law judge recognized that this case was highly unusual and serious, and that respondent's actions could have produced a disaster in view of saturated and sequential traffic pattern. The law judge nevertheless reduced the period of suspension from 60 to 20 days, based on a number of factors, including a) respondent's prior exemplary record, b) the fact that his actions were not deliberate, willful or reckless but rather inadvertent, c) respondent's concern for fuel consumption and his belief that, under the circumstances, he could not legally reduce the aircraft speed below 200 knots, and d) the law judge's expectation that respondent has profited from his experience and would not react in a similar manner in the future should the same circumstances arise.

After considering the factors cited by the law judge, and weighing the entire record and the circumstances surrounding the incident, the Board is not persuaded that a reduction in the sanction ordered by the Administrator is appropriate in this case. The factors cited in mitigation by the law judge may be clear but they are not compelling,[14] since

the wrong parallel runway, which had been closed but on which there were no obstructions of any kind, produced an element of danger which was too remote to come within the intendment of section 91.9. In the instant case, on the other hand, it is our conclusion that there was potential endangerment caused by respondent's action which was not so remote as to fall without section 91.9 and which was reasonably foreseeable. Finally, in *Administrator* v. Degan, 1 N.T.S.B. 1907, the Board found that respondent's refusal to go around, while warranting a censure, was not violative of sections 91.75 or 91.9. In that case, however, the controller immediately cleared the aircraft to land, and there was no protracted discussion such as that herein.

[14]The Board has held that "in those cases where all of the violations are affirmed, we believe it is incumbent on the law judge to offer clear and compelling reasons for reducing the sanction." *Administrator* v. *Musquiz*, Order EA-711, June 23, 1975, p. 10 of Opinion. The fact that the law judge found careless (rather than

they are either irrelevant, misapplied, or without foundation. The Board has repeatedly emphasized that a "prior exemplary record" should be considered the norm, rather than the exception, and thereby does not justify a reduction in sanction.[15] The law judge's statement that respondent's actions were inadvertent rather than deliberate is difficult to reconcile with the record. Although respondent no doubt did not intend that the principal and most significant result of his actions would be to divert the controller's attention from his duties, the fact remains that the initiation and persistence with the protracted discussion was a deliberate rather than inadvertent act on the part of respondent. With respect to respondent's reasons for refusing the speed reduction to 180 knots, the Board, as discussed hereinabove, does not believe fuel economy was a valid justification for such refusal since it was outweighed by the importance of maintaining a safe and orderly flow of inbound traffic. Moreover, and contrary to a statement of the law judge, respondent never expressed the belief that he could not legally operate under 200 knots. Finally, the Board does not believe that the expectation that a respondent has learned his lesson constitutes a valid reason for reducing sanction.[16]

In regard to precedent, the Board has had occasion, in two recent proceedings, to review orders of the Admin-

reckless) operation does not mean all of the charged violations were not established inasmuch as the complaint was worded in the disjunctive ("careless or reckless").

[15]See, e.g., *Administrator* v. *Smith*, Order EA-709, June 9, 1975.

[16]We would note, in any event, that despite a prolonged interrogation during which the law judge attempted to extract some sign of contrition from respondent, the latter held to his position that he would basically react in the same manner, other than to change his wording slightly, should such a situation arise in the future.

istrator suspending for 60 days the airline transport pilot certificate of an air carrier captain for violations which, like those in the instant case, were deliberate in nature and involved basic operational practices or air traffic rules.[17] The Board, in those cases, reduced the sanctions to suspensions of 45 and 30 days on the basis of ATC involvement—i.e., improper actions or omissions on the part of the controller in carrying out his prescribed duties. In the instant case, however, we can discern no conduct on the part of the controller, and no circumstance of record, which would justify a reduction in sanction. Consequently, and in view of the nature of the violation and the inherent hazards resulting therefrom, it is our conclusion that a 60-day suspension is warranted.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal be and it hereby is denied;

2. The Administrator's appeal be and it hereby is affirmed;

3. The Administrator's order be and it hereby is affirmed; and

4. The 60-day suspension of respondent's airline transport pilot certificate shall commence 30 days after service of this order.[18]

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[17] *Administrator* v. *Gould*, Order EA-917, October 28, 1976; *Administrator* v. *Dunkel*, Order EA-880, July 19, 1976. In *Gould*, the respondent descended below the assigned altitude while in a terminal control area, whereas in *Dunkel* the respondent took off at a time when he knew that the prevailing visibility was below the takeoff minimum.

[18] For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the Federal Aviation Administration, pursuant to section 91.19(f) FAR.

TODD, Chairman, BAILEY, Vice Chairman, McADAMS, HOGUE, and HALEY, Members of the Board, concurred in the above opinion and order.

Supreme Court, U. S.
FILED
DEC 4 1978
MICHAEL RODAK, JR., CLERK

No. 78-652

In the Supreme Court of the United States

OCTOBER TERM, 1978

DAVID B. PEAT, PETITIONER

v.

NATIONAL TRANSPORTATION SAFETY BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-652

DAVID B. PEAT, PETITIONER

v.

NATIONAL TRANSPORTATION SAFETY BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner is an airline pilot whose license has been suspended for 60 days for violating Federal Aviation Regulation 91.9, 14 C.F.R. 91.9, which states that: "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." The National Transportation Safety Board affirmed the suspension order of the Federal Aviation Administration. Both found that petitioner refused to adhere to clearance instructions of an air traffic controller and instead engaged the controller "in a steady conversation which had the effect of monopolizing the frequency and thus precluding the controller from giving an appropriate degree of attention to other aircraft under his control" (Pet. App. A-9). The court of appeals affirmed (Pet. App. A-1).

Petitioner does not dispute the Board's finding that the radio communications were unnecessary and careless, and that they could have endangered the lives of others by

diverting the attention of the air traffic controller (Pet. App. A-4 to A-9). The Board's determination that such careless conduct is a form of the careless operation prohibited by Section 91.9 is entitled to great weight in construing the regulations. *United States* v. *Larionoff*, 431 U.S. 864, 872-873 (1977); *FTC* v. *Mandel Bros.*, 359 U.S. 385, 391 (1959).

Petitioner's contention is that the regulation did not give him adequate notice that his careless communications were prohibited. Petitioner does not contend, however, that the regulation has ever been interpreted so as to permit such careless radio communications. In the absence of any such contention, the plain language of the regulation comprehends the behavior of petitioner and gave him more than adequate notice of the proscribed activity.[1]

[1]The cases on which petitioner relies for a contrary proposition involve criminal statutes, which must be clearly written to give adequate notice. Regulations in civil cases may be upheld even when they are not as precise as would be necessary to support the imposition of criminal sanctions. *CSC* v. *Letter Carriers*, 413 U.S. 548, 568-581 (1973). But because, even in criminal cases, vagueness challenges must be examined in the light of the facts of the case at hand (see *United States* v. *Powell*, 423 U.S. 87, 92 (1975)), the application of the regulation at issue here is constitutional under the standard used in civil cases.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[2]

WADE H. MCCREE, JR.
Solicitor General

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[2]Petitioner's second contention (Pet. 6-7)—that there is no evidence to support the finding that his conduct was "operation of an aircraft" within the meaning of Section 91.9—is based on petitioner's premise that the regulation cannot comprehend careless monopolization of the radio frequency. Because petitioner's premise fails, there is more than an adequate factual record to support the Board's determination that petitioner's conduct was proscribed.

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